

BOOK REVIEWS

The Swiss Civil Code. Translated by Robert P. Shick. Corrected and revised by Eugen Huber, Alfred Siegwart, and Gordon E. Sherman. Official publication of the Comparative Law Bureau of the American Bar Association. Pages XXXII and 262. Boston Book Co. Boston, 1915.

Since 1912 the Swiss people no longer live under the enormous and vexatious handicap of 20 odd varieties of cantonal or state law. The remedy selected to cure the Swiss affliction of diversity of law was thoroughly successful: namely *federal* legislation making *one* system of *uniform* private law for all Switzerland.

Would that the Swiss success will enlighten the promoters of the American movement for uniform private law via *state* action: their remedy is but a palliative for our great diversity of private law and cannot effect a cure, for when American uniformity via state action is once obtained it remains permanent (like the changing Negotiable Instruments Act) only so long as each American state refrains from exercising its natural right to tinker any law. Federal codes of private law did not annihilate the Swiss states; neither will federal codes destroy the American states.

The English translation of the new Swiss Civil Code reflects great credit upon Mr. Shick, whose very exacting work has been excellently done. His uniform terminology and clearness deserve special praise. Mr. Shick's work was given the benefit of a careful revision not only by two distinguished Swiss and German jurists, but also by Professor Gordon E. Sherman of the Faculty of Law, Yale University.

C. P. S.

Woodbine's Bracton. Bracton De Legibus et Consuetudinibus Angliæ Vol. I. Edited by Professor George E. Woodbine. Yale University Press. New Haven. 1915. pp. XII, 422, quarto. Price \$5.00 net.

Through the scholarly labors of Professor Woodbine of Yale University and the generosity of the late Mr. John E. Parsons of New York, the Yale University Press has been enabled to begin the publication of what promises to be the long desired definitive edition of Bracton. The volume here noted is handsomely

printed in large type, white buckram back, and in mechanical detail is well worthy of the importance of the set of volumes contemplated. Many legal scholars have expressed their desire for such an edition, none more earnestly than the late Professor F. W. Maitland, perhaps the most distinguished scholar in English legal history, the editor of "Bracton's Note Book" and author of "Bracton and Azo."

Bracton's *De Legibus* was first printed in the original Latin in 1569, and was reprinted in 1640. The only other edition is that with English translation printed in the Roll Series in six large volumes, 1878-1883. This edition does not appear to have been wholly satisfactory, and the demand for an authoritative text has continued. The reason for such demand is not far to seek. By common consent of those who know, Bracton "was rivalled by no juridical English writer till Blackstone arose five centuries later." (Lord Campbell, adopted by Maitland.) Fleta and Britton are little other than abridgements. The *De Legibus* was written about 1250 to 1259. Thomas Aquinas probably was at the same time writing the *Summa Theologica*, still in use in Catholic seminaries. Dante was not born until six years later. It was a hundred years before the birth of Chaucer and thirteen years before Edward I, the English Justinian, ascended the throne.

Like most judges of his time Bracton was an ecclesiastic. For twenty years he was a justice of assize. He also held various church offices and was chancellor of Exeter Cathedral at the time of his death in 1268. The *De Legibus* is a large treatise, even as modern law books go, equalling at least two stout volumes and, as anticipating the method of development of English law, is founded largely on cases. Some of the more general treatment is based on Azo's "Summa of Roman Law." Maitland's "Bracton and Azo" and Güterbock's "Bracton and his Relation to the Roman Law" show to what extent and for what purpose he made use of the Summa of Azo. Maitland says it was Rationalism, not Romanism, that Bracton derived from Azo, and that the great body of this work is based on actual case law, some five hundred cases being cited from the Rolls. As was very common until the modern civil action was adopted, the work is based on the division of the law into persons, things, actions; and the main part of the substantive law is developed in the division of actions, civil and criminal. Professor Woodbine has on pages 60-62 constructed a table of contents of the *De Legibus*

showing the importance and length of the treatment of the law under the titles of the various actions then in use. The purpose of the book is briefly indicated where Bracton says that he has "for the instruction, at least of the younger generation, undertaken the task of diligently examining the ancient judgments of righteous men, not without much loss of sleep and labor, and by reducing their acts, councils, and answers and whatever thereof I have found noteworthy, into one summary I have brought it into order to be commended to perpetual memory by the aid of writing." This reminds one of the words of Aquinas, that his purpose was "to teach such things as belong to the Christian religion after the fashion suited to beginners." "The younger generation" of Bracton, and the "beginners" of Aquinas must have found their authors equally difficult. The contents of this treatise have been so often worked over and have become so incorporated in the common law, that the original statements, like the cases from which they were derived, have long since vanished from the field of citation. Unlike Aquinas, Bracton is now seldom referred to except in works on early legal and constitutional history. But for all workers in legal and constitutional history he is the one invaluable original authority on the common law of his time. English and American scholars in these fields are under great obligations to Professor Woodbine for undertaking the immense task of editing an adequate and nearly as may be, a final edition, a task in which the editing, as undertaken, means practically the finding of what is original to Bracton.

The present volume is the first of a proposed series of six, of which the second and third are to be the Latin text, the fourth and fifth a translation, and the sixth an introduction, in which may be gathered the results of the years of study necessary to complete the task.

The first volume is purely preliminary showing the problem undertaken and the critical methods used. The original Bracton is unknown, but there are forty-six manuscripts accessible and two or three inaccessible. It is to be gathered from this volume, that no one of these manuscripts is known to be a direct copy of the original. They are widely variant in importance. For instance, if a group of manuscripts say, A B and C, can be shown to be copies of manuscript R, itself a copy from an earlier manuscript, then A B and C practically drop out of sight and R becomes the important manuscript in that group,

when searching for the unknown manuscript X. All date from the period about between 1275 and 1325. They were, of course, copied by hand upon vellum. Generally more than one copyist was employed on a single manuscript, and often as many as a half dozen, perhaps more. It would depend on the facilities of the scriptorium and the urgency of the order. They all apparently are for the use of judges or practitioners. They contain marginalia and addiciones by the lawyers using them. Indeed Bracton probably had made many notes and addiciones to his own original work. Many of these in copying became incorporated in the text, until from a single manuscript it is impossible to tell the additions and comments from the original text. The problem is, from these variant manuscripts, by collation and by criticism of contents to determine what is and what is not Bracton. The process of exclusion, comparison and final determination of what manuscripts are not valuable is stated at length and is really in places, almost as fascinating as a novel, once the proper mental atmosphere is obtained. Suitable tables show the results. Diagrams show the relation between the manuscripts in various groups; the manuscripts are referred to in symbols, viz., Y refers to the manuscript in Yale University Library and HA and HB those in Harvard Law School Library. The volume itself is not only valuable to the scholar for the wealth of detail as to the various manuscripts and their comparison, but is of interest to any one caring at all for our legal antiquities, as showing the difficulties to be encountered, the labor involved, and the methods employed, in solving the problem of what Bracton himself said. Some seventy-five pages of collation are given and the results worked out in detail. These lead the learned editor to differ from Maitland as to the value of the Digby manuscripts, and also as to the value of the Rawlinson manuscript C 160, the text manuscript adopted by Sir Travers Lewis, the editor of the edition in the Rolls series. As to all these matters the reader must take the conclusions of the editor. To really criticise this first volume needs a scholar at least as learned in the subject as was Maitland. If Mr. Justice Holmes, who in his Common Law not infrequently cites Bracton, "cannot speak competently of the detail of this monumental work," as he says in the *Yale Review*, Professor Woodbine would seem in this respect to be as safe from criticism as the wise man in Iceland, who could not be prosecuted for an offense he had committed, because he was the only man who knew the

appropriate form of action. Professor Woodbine has made the subject peculiarly his own. The most that the writer of a book notice of this first volume can do is to congratulate him on the selection of his subject, to express high appreciation of the scholarly and comprehensive way he has stated and explained the problem and the methods employed in its solution, and to say that the work when completed according to the plan outlined in the preface to this volume, will be a monument to American scholarship and will be the authoritative source of knowledge of the common law in the thirteenth century.

E. B. GAGER.

Wigmore on Evidence. By J. H. Wigmore. Published by Little, Brown & Company, Boston. 1915. Volume V. pp. 935.

The volume in hand is the second edition of the supplement to Professor Wigmore's classic treatise on the law of evidence. The author's aim in this volume is to bring that work down to date. The section numbering in this volume follows that in the treatise which it supplements. Additions to and changes in some of the sections of the text have been made, but the main value of this volume lies in the fact that all the cases decided since the publication of the treatise have been gathered and cited in their proper places, so that the work is strictly up to date.

The preface to this volume is in the nature of a critique of our present law of evidence. The author surveys the whole field in a very general way. He points out those rules which, in his opinion, should be eliminated altogether and offers suggestions for the improvement of those which he thinks should be kept. He also adverts to certain defects in the present day administration of the rules of evidence and offers some very timely criticisms of our courts and lawyers. In closing, he says: "The administration of justice, being a human affair, is not very unlike the human body. The perfect operation of any one organ is dependent more or less on the general conditions of the rest of the body. And the system of Evidence is dependent upon procedure in general, upon the organization of courts, upon the personnel of the judiciary and of the bar, upon the human nature of the witnesses, and upon the temper of the community in wanting and supporting a high and intelligent

standard of justice. Let us therefore expect that the system of Evidence, on the whole, will most readily improve when the men who administer it also improve and the system of justice as a whole advances. Sound rules of Evidence, in short, are as much a symptom as a cause of better Justice."

This very able and suggestive preface is enough to make the possession of this volume well worth while. It is indispensable to one who uses Mr. Wigmore's treatise.

The Law of Electricity. By Arthur F. Curtis. Published by Matthew Bender & Company, Albany, N. Y. 1915. pp. 1117.

In this book the author has sought to state all the law as laid down in the hundreds of decisions relating to electricity, that force which is each day playing an increasingly large and important part in the world's affairs. He has striven to produce a single volume where a busy lawyer can find the law and the cases in point when he has a problem in which electricity is involved. The aim has been to save the practitioner the time and trouble which are necessarily involved when he has to search through the elaborate treatises on municipal corporations, eminent domain, taxation, contracts, franchises, streets and highways, abutting owners, nuisances, telephones and telegraphs, negligence, master and servant, evidence, etc., to find the information he wishes. It is easy to see the value of a work which accomplishes the author's aim.

The book in hand is both comprehensive and thorough. It gives the law as laid down by the American, English and Canadian courts. Slightly less than twenty-five hundred cases are cited. The author's style is clear and concise and he has arranged his material well. It is our belief that this book will prove a useful and time-saving tool for the lawyer who has cases involving this subject. To all such we heartily commend it.

Evolution of Law Series. Compiled by Albert Koukorek and John H. Wigmore. Published by Little, Brown & Company, Boston. 1915. pp. 702 and 704.

"Sources of Ancient and Primitive Law" and "Primitive and Ancient Legal Institutions" are the titles of these, the first two

volumes of the "Evolution of Law Series." The series will consist of three volumes and will comprise select readings on the origin and development of legal institutions. "Formative Influences on Legal Development" is the title of the volume of the series which is yet to appear.

In preparing this series the authors endeavor to furnish a text-book and source-book for institutional legal study in the law schools and colleges of liberal arts, to interest the professional lawyer in his semi-professional reading and to interest the general reader who has an educated man's interest in the law as a human institution developing in history.

The appearance of this series is an evidence of the increased attention which is very recently being given to the study of comparative legal history. Sir Henry Maine's *Ancient Law* has for a half a century been almost the only readily accessible source of information in English to which the ordinary student, who is interested in this aspect of legal study, could go. The compilers of this series have placed students of the law generally under obligation to them for a distinct improvement of this situation.

The first volume is a compilation of sources selected from ancient literatures, modern observations of retarded peoples, ancient laws and legal transactions, including trials and documents. The second volume comprises a selection of chapters from modern scholars, such as Kohler, Post, Gabriel Tarde, Del Vecchio, Maine, J. W. Powell, Andrew Lang, Coulanges, Sohm, Wigmore and others, expounding the relation of law to general social institutions, and such specific legal institutions as Family, Property, Contract, etc. Much of the material in this volume appears in English for the first time. The last volume will be a selection of similar chapters interpreting the formative influences which have governed the development of the law.

The series, as a whole, is to deal with what may be termed the histology of the law; its object is to inquire not merely what has been projected upon the canvas of legal history but how and why legal institutions have developed and taken the characteristic forms shown in all systems of law. The immediate working thesis from which the series claims a vindication for its existence is to be found in the essential unity of human nature. In this, it is thought, will be found an explanation of the similarity of institutions among a diversity of peoples where the principle of imitation cannot be invoked.

The case method has proved a successful way to study law and it is spreading to other fields of study. The compilers of this series seek to extend the spirit of this method into the study of legal evolution. For this their endeavor is distinctly commendable.

The Enforcement of Decrees in Equity. By Charles Andrews Huston, Professor of Law in Stanford University. (Harvard Studies in Jurisprudence, Vol. I.) Harvard University Press, Cambridge, Mass. 1915. pp. xxi and 189.

The book before us is welcome not only for its intrinsic merit but also, perhaps in even more goodly measure, for its great significance as the first volume of the Harvard Studies in Jurisprudence. The law school of Harvard University has existed for nearly a century, and throughout that time it has rendered distinguished services to the legal profession and to the country at large both by training thousands of men for the practice of the law and by contributing, through its faculty, many learned and valuable treatises on various branches of the law. The latter works have constituted notable achievements and have had such far-reaching and ameliorating influence on the law as would alone have justified the great expense of maintaining such a center of legal scholarship. Conceding all this, it is nevertheless obvious that the Studies in Jurisprudence represent something different. In authorship, in purpose and in prophecy they mark the broader juristic activity, the direct constructive work and the all-important training of jurists on which the school is now so well started under the brilliant leadership of Professor Roscoe Pound. These more fundamental activities and resultant contributions to juristic thinking and writing harmonize well with President Lowell's recent sound and unambiguous declaration that "a university is not only a place for teaching, but *even more* for thinking and writing." (Harvard Alumni Bulletin, Nov. 10, 1915, p. 119.)

Professor Huston's work was written, as a thesis for an advance degree, under the direction of Professor Pound; and the book is appropriately dedicated to the latter.

The author's discussion falls into two fairly distinct parts. In summarizing the first, he says: "This essay is written primarily to advocate an enlargement of the equity powers of American courts which will enable them to give a real effect to their decrees;

for example, to transfer titles directly instead of by ordering a litigant to make a transfer. This is no innovation. Such power exists in more or less perfect form in most of the states of the Union . . . But some states, and it is believed the Federal jurisdictions also, lack this power. Moreover, it nowhere exists fully for all cases and its need has become more apparent to-day because of a definite trend in our legislation aiming at a restriction of the contempt process which constitutes the original, and still here and there the only, enforcing agency of our courts of equity."

As regards this subject, most, if not all, of Professor Huston's criticisms of existing defects and suggestions of possible improvement are likely to meet with general approval; and the main discussion, together with the appendix giving an exhaustive collection of statutes on the subject, should be distinctly helpful in connection with future legislative and judicial amelioration of present conditions. The present writer, however, finds it difficult to agree with the criticisms of *Deck v. Whitman* (1899), 96 Fed. Rep. 873, so far as the reasoning of that case, as regards the power of the federal courts to proceed *in rem* in equity cases is based on constitutional provisions and acts of Congress, more especially, Act of March 3, 1875, § 8 (substantially re-enacted as § 57 of the New Judicial Code). Then, too, the new Federal Equity Rules, especially Rules 7 and 8, expressly recognizing and conceding the former to proceed *in rem*, might well have been evaluated and balanced against the doubts and fears for the future set forth at the close of the discussion of the federal statutes and decisions. One of the best features of the author's broad and fundamental treatment of the subject now before us consists of the chapter tracing the development of specific relief and procedure *in rem*, etc., under the Roman Law and the codes of France and Germany. The greater perspective derived from comparative, or eclectic, jurisprudence and the more open-minded attitude engendered thereby are sure, in the long run to have liberalizing and beneficial results in the improvement of our legal system.

The second part of the book under review constitutes a discussion of the nature of the equitable interest of a *cestui que trust*. For about a decade certain legal scholars in this country, including Professor Pound (26 Harvard L. Rev. 464), have, both in their teaching and in their writings, vigorously insisted upon the serious inadequacy of the oft-repeated assertion of such learned

writers as Langdell, Maitland, Pollock and Tiffany that the cestui's interest is merely a right *in personam*. Professor Huston now joins the ranks of the former and becomes an effective ally. He puts the matter in this way:

"The essence of rights *in rem* is the generality of the claim they give the owner to affect the actions of others—the extent, in other words, of their incidence. The duties corresponding to these rights are imposed not merely on some single definite person but generally upon all who may deal with the object of these rights, subject only to the overriding powers which in some cases may be conferred on some other person for some other purpose. Thus the rights *in rem* of a property owner not to have his property trespassed upon may be subject to the power of eminent domain . . . In this sense many, though by no means all, so-called equitable rights have now passed beyond the status of rights *in personam* against some particular vendor, trustee, or mortgagee, and have become rights *in rem* available against all the world, but subject to a power in the holder of the legal title to the property involved to cut off these equitable rights by a transfer to *bona fide* purchasers for value without notice. . . . The history of the development of this important and characteristic Anglo-American institution reveals most clearly a progress from a pure obligation, binding only the trustee and his cestui, to a property right . . . My thesis briefly is that . . . an account of cestui's rights is justified in characterizing them as a complex including not only rights *in personam* but also genuine rights *in rem*."

The views of the present writer are in hearty agreement with the author's main position and with most of the points and authorities marshalled by the latter in support thereof. It is possible, however, that this position could have been made even more secure by discussing in greater detail than does the author the exact sense in which it is true that the *cestui que trust* has rights *in rem* (or indeterminate rights) against persons in general as well as certain special rights *in personam* (or determinate rights) against that particular person who is the trustee. Such comparatively few persons as actually know of a particular trust are under actual, or present, equitable duties not to accept conveyance of the legal title from the trustee; and no doubt the *cestui's* correlative rights against these third persons could be vindicated by securing an injunction against any such threatened acceptance of conveyance. But how

about the vast majority of persons, who, of course, have no present knowledge or notice of the trust? Are they, *apart from recording acts and resultant doctrines of constructive notice*, under actual, or present, duties to the *cestui*? Perhaps, as a mere matter of legal terms and sufficient communication of ideas, it would suffice to say that the *cestui* has actual, or present, rights *in rem* against such persons, *to wit*, that they should not *knowingly* accept conveyance from the trustee. In justification of this form of exposition reference might be made to a somewhat similar usage in stating the doctrine of *Lumley v. Gye*, viz., that a party to a contract has rights *in personam* against the other contracting party and also rights *in rem* against all third parties (almost all of whom would of course have no present knowledge of the contract) that they should not, without special justifying facts, interfere with the performance of such contract. Thus, in *Temperton v. Russell* (1893), 1 Q. B. 715, 730, Lopes, L. J., asserted that "the contract confers certain rights on the person with whom it is made, and not only binds the parties to it by the obligation entered into, but also imposes on *all the world* the duty of respecting that obligation."

If, however, it should be objected that, under a more strict use of terms, the *cestui* has actual, or present, rights only against those having actual knowledge or notice, that technical difficulty could be met by explaining that, as against innocent parties, the *cestui* has, at the least, very important "possibilities" *in rem*,—that is, "potential, or inchoate, rights" *in rem*. If any such person, originally unaware of the trust, gains knowledge thereof, then at the latest he comes under an actual, or present, duty not to accept conveyance; and, correlatively, the *cestui's* potential, or inchoate, right matures at that moment into an actual, or present, right. In defense of the usage discussed in the preceding paragraph, it might possibly be contended by some that even a person without knowledge is under an actual, or present duty, in the strictest sense, and that this is shown by the fact that, if he has given no value, he comes under an equitable duty to surrender even an innocently acquired title. As to this, however, it would seem sufficient to reply that this constructive duty is imposed by equity, not as a secondary, or remedial, duty in reparation for breach of a pre-existing primary duty, but rather as being itself a primary duty created in order to prevent unmeritorious enrichment on the part of the innocent transferee. This constructive equitable duty is in fact entirely similar to the

primary quasi-contractual, or constructive, duty to pay back money innocently received under a mistake of fact. (Cf. Woodward, Quasi-Contracts, § 32.) From this stricter point of view, then, it is clear that the *cestui* has, *first*, certain special rights *in personam* against the trustee in relation to the administration of the trust; *second*, actual, or present, rights *in personam* against persons *having knowledge or notice of the trust*, that they shall not accept conveyance of legal title from the trustee; and *third*, two classes of "possibilities" *in rem*, or "potential rights" *in rem* against persons in general: (a) if knowledge should be acquired, not to accept legal title; (b) if without knowledge and without value legal title should be received, to reconvey such title on demand.

Even this enumeration takes no account, of course, of the fact that the *cestui's* entire interest consists of much more than rights, or claims, in the strict sense. It is indeed a complex aggregate of actual and potential rights, privileges, powers and immunities; and to appreciate clearly the exact nature of all these jural elements it is necessary to consider definitely the "conflict" of the "legal" and the "equitable" relations involved and to discover the net residuum derived from a "fusion" of law and equity.

Professor Huston's book is thoroughly deserving of the honor of inaugurating the series of Harvard Studies in Jurisprudence; and it is to be hoped that the volume will be widely and carefully read.

WESLEY N. HOFFELD.